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IN THE SUPREME COURT OF THE STATE OF ALASKA

Lance Pruitt, Jeff Garness, Lisa Garness, Shannon Carte, Donald Crafts, Susan M. Kent-Crafts, and Carolyn "Care" Clift,	)	
Appellants,	)	
v.	)	
Lt. Governor Kevin Meyer, in his official capacity as Lt. Governor for the State of Alaska, and Gail Fenumiai, in her official capacity as Director of the Division of Elections,	)	Supreme Court No. **S-17971**
Appellees,	)	
Elizabeth A. Hodges Snyder,	)	
Intervenor-Appellee.	)	
Trial Court Case No. **3AN-20-09661 CI**		

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STATE'S OPENING BRIEF

INTRODUCTION

Lance Pruitt and Elizabeth Snyder were candidates for the District 27 seat in the Alaska House of Representatives in the 2020 general election. After a recount confirmed that Mr. Pruitt lost the race by eleven votes, he and a group of his supporters filed an election contest and a recount appeal. But as the superior court correctly concluded, all of the challenges fail—despite the unprecedented COVID-19 pandemic, the Division of Elections successfully conducted the 2020 general election and properly counted the House District 27 votes, and none of the claims warrant disturbing the result. Not only do the challenges fail, but Mr. Pruitt's false and reckless allegations against dozens of innocent voters along the way provide a cautionary tale.

Mr. Pruitt has now abandoned all but count two of his election contest, which alleged that the Division violated AS 15.10.090 by failing to provide the required notice

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of a change in the polling place location for Precinct 915. The superior court correctly dismissed this claim as inadequately pled because Mr. Pruitt failed to allege that any statutory violation was knowing or reckless. But to avoid any need for a remand, the superior court also heard evidence and rejected this claim on the merits, finding that the Division adequately notified voters of the change and that Mr. Pruitt did not show that any notice imperfection was sufficient to change the election results.

The Court should affirm the superior court's rejection of this claim either on its face or on the merits. And although Mr. Pruitt and his supporters have stopped pursuing their nonresident voting allegations, the history of this case should inspire the Court to consider clarifying the law so that losing candidates have no incentive—in either an election contest or a recount appeal—to harass voters and comb through their property records after an election in an effort to void a close election result.

FACTS AND PROCEEDINGS

I. Lance Pruitt lost the 2020 general election for the House District 27 seat.

2020 was not a normal year for anything, including elections administration.[Tr. 158] The COVID-19 pandemic introduced unprecedented challenges, requiring extraordinary efforts by the Division of Elections and flexibility to accommodate ever-changing conditions. [Tr. 159] Some of the challenges included recruiting willing poll workers, acquiring personal protective equipment, processing large numbers of absentee ballots, renting additional office space, and training staff in new processes and procedures. [*Id.*] Arranging polling places for in-person voting was not easy either: some of the usual facilities were unwilling to welcome voters, and some were not large

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enough to allow proper social distancing. [*Id.*] The Division worked hard to secure appropriate facilities and back-up locations for many precincts. [Tr. 52-53] Despite the many challenges, the Division successfully ran the 2020 general election, and voters were able to vote by various methods—including absentee, early, and in person—from October 2020 through Election Day on November 3. [Tr. 164]

Two candidates sought to represent House District 27 in the Alaska House of Representatives, Lance Pruitt and Elizabeth Snyder. House District 27 is located in Anchorage and has eight precincts where residents can vote in person on Election Day. [R. 731] The Division had to change the polling place for one of these precincts—Precinct 915—twice in 2020. [Tr. 159-60] The location was changed for the August primary election because the usual facility had instituted COVID-19 screening procedures that could have prevented some voters from voting. [Tr. 25-26, 160] The location was changed again for the general election due to the property owner's refusal to host the polling place. [Tr. 40. 160] The Division notified voters of the change by posting signs at the prior locations and updating its website and voter hotline. [R. 713-15; Tr. 28-29, 162-64] Despite the change, voters in Precinct 915 were able to vote in person on Election Day and many did so. [Tr. 115, 120]

The Division originally certified the House District 27 election result as 4,562 votes for Mr. Pruitt and 4,575 votes for Dr. Snyder, making Dr. Snyder the winner by

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thirteen votes.[1] A group of voters then requested a recount. The Division held the recount in Juneau on December 4. Representatives for both candidates and their respective political parties were present and had the opportunity to challenge the Division's vote-counting decisions.[2] During the recount, the margin narrowed slightly and the Division certified Dr. Snyder as the winner by eleven votes.[3]

II. Mr. Pruitt filed an election contest and a group of his supporters filed a parallel and overlapping recount appeal.

On December 9, Mr. Pruitt filed an election contest in the superior court and a group of his supporters filed a recount appeal in this Court. [S-17951, *Statement of Points on Appeal*; R. 544-48] Dr. Snyder intervened in both cases to defend the result. [R. 486] The Court appointed the superior court to serve as Special Master in the recount appeal and indicated that the recount appeal would be consolidated with any appeal from the election contest.

In the election contest, Mr. Pruitt's original complaint raised three counts, alleging first, that the Division violated AS 15.20.203 by "fail[ing] to develop a procedure for review of the signatures" after the courts suspended the absentee ballot witness requirement in *Arctic Village v. Meyer*;[4] second that the Division violated

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1 *See* Alaska Division of Elections, *2020 General Election Summary Report*, https://www.elections.alaska.gov/results/20GENR/data/sovc/ElectionSummaryReportRPT24.pdf.

2 *See* Recount Appeal Record (bates numbered with "RAR").

3 *See* Alaska Division of Elections, *Official Recount Results*, https://www.elections.alaska.gov/results/20GENR/data/sovc/HD27Recount.pdf.

4 Order, *State of Alaska et al., v. Arctic Village et al.*, S-17902 (Oct. 12, 2020).

AS 15.10.090 by failing to provide statutorily required notice of the last-minute polling-place change for Precinct 915; and third that the Division violated the Fourteenth Amendment to the United States Constitution by "disenfranchising certain voters, allowing at least one voter to vote twice, and by failing to otherwise properly conduct the election . . . ." [R. 544-48]

In the recount appeal, the Pruitt supporters raised five points, including two points asserting that a total of seven unidentified people voted early or absentee, but were not residents of House District 27. [S-17951, *Statement of Points on Appeal*, 2] Mr. Pruitt filed an amended election contest complaint on December 14, attempting to add a new count, numbered count three, alleging—similar to the recount appeal—that "several voters" who were not residents voted in House District 27. [R. 540]

Pursuing these voter residency claims in various superior court filings, Mr. Pruitt publicly accused an evolving list of named voters of wrongdoing on thin evidence. He had his campaign manager and a paralegal investigate voters in the district, calling their homes and inquiring about their living situations. [R. 441-42, 263-65] He then moved for judicial notice that 21 named voters were not residents for the 30 days preceding the election. [R. 314-15] Even though he misunderstood the voting residency requirement—and the statutory presumption that voters reside at their registration addresses[5]—he claimed that these voters had recently moved out of the district and, therefore, voted illegally. [R. 141, 305] He based this on public records, primarily recorded deeds. [R.

[5] AS 15.05.020(8).

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304-05, 317-381] When confronted with evidence that most of these voters had not had their votes counted in the House District 27 race, or had not even moved out of the district based on his own evidence, Mr. Pruitt withdrew 15 voters from his motion for judicial notice. [R. 143-45, 682-83] Undeterred by the fact that most of his original accusations were false—and the remainder of them reasonably disputed—Mr. Pruitt filed a second motion for judicial notice again naming voters and asserting that they voted illegally, based primarily on property records. [R. 196]

Both the State and the intervenor, Dr. Snyder, moved to dismiss all of Mr. Pruitt's election contest claims and opposed his motions for judicial notice. [R. 87-90, 137-47, 386-401, 403-16]

III. The superior court dismissed the election contest claims and found that the Division's ballot-counting decisions were consistent with the law.

The superior court denied Mr. Pruitt's motions for judicial notice and granted the State's and Dr. Snyder's motions to dismiss all of the election contest claims. [R. 496-511] The court rejected Mr. Pruitt's amended complaint—in which he attempted to add count three—concluding that Mr. Pruitt could not add a new election contest claim two weeks after the Division certified the election and one week before trial. [R. 500-02]

The superior court concluded that even if it had been timely, count three—along with the three original counts—failed to state an election contest claim because Mr. Pruitt had not alleged actions by the Division that could constitute "malconduct." [R. 502-11] Count one did not allege malconduct because the Division was neither required nor authorized to develop a new signature-review process after the courts

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suspended the witness requirement for absentee ballots. [R. 502-04] Count two did not allege malconduct because it failed to allege that the Division knowingly or recklessly provided inadequate notice of the polling place change. [R. 505-07] Count three—the residency claim—could not be heard in the election contest because challenges to voter qualifications must be considered in a recount appeal, and only then when the voter's ballot has been properly challenged and segregated from other ballots. [R. 508-10] The court observed that Mr. Pruitt's "withdrawal of the names of fifteen of the 21 voters he publicly accused, without any basis, improperly voted in the election, demonstrates the danger of allowing contestants to question voter qualifications after an election through election contests." [R. 510] As for count four, Mr. Pruitt had withdrawn the only specific allegation—that one person voted twice under two different names—after learning that the names he accused were in fact two different people. [R. 510-11]

Despite dismissing all of Mr. Pruitt's election contest claims, the superior court—with the agreement of the parties—nonetheless heard evidence on count two, the polling place claim. Because the court dismissed this count as inadequately pled—whereas it dismissed the other counts for more "substantive" reasons—the court did this in an abundance of caution. [Tr. 9; R. 514-16] The court and the parties hoped this unusual procedure would provide this Court everything it needed to issue a final decision—with no remand—before the legislature convenes on January 19, 2021.

Thus, on December 22 and 23, the superior court held a trial, allowing Mr. Pruitt to put on evidence to try to meet his election contest burden with his Precinct 915

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polling place claim. The court heard from elections officials, poll workers, two expert witnesses, and a single voter who was frustrated by the polling place change. [*See* Tr. 2] The court then issued findings rejecting the claim on the merits. [R. 514-34] The court found that the Division "did provide notice to the registered voters of the change in polling location," that any failure to provide full notice under AS 15.10.090 was not "significant," and that the Division "acted in good faith in attempting to notify affected voters about the change to the polling location" even though there was "more the Division could have done." [R. 528, 533] The court declined to find that any deviation was "knowing or done in reckless disregard of the statute's requirements." [R. 534]

The court also found that Mr. Pruitt's evidence did not show depressed turnout in Precinct 915, and that even if it had, it did not show that "the Division's failure to notify the Municipal Clerk"—the only additional statutory notice that was feasible under the circumstances—"caused a reduction in votes sufficient to change the result of the election." [R. 527] The court also issued findings in the recount appeal concluding that all of the Division's vote-counting decisions were consistent with the law. [R. 470-78]

Mr. Pruitt has appealed only the superior court's dismissal of count two of his election contest—the polling place claim—and its alternative conclusion on the merits of that claim. The Pruitt supporters have withdrawn their recount appeal.

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ARGUMENT

I. Legal standard for an election contest

A defeated candidate or group of ten voters may file an election contest no more than ten days after the Division certifies the election results.[6] A valid election contest must allege one or more of three very specific grounds. Under AS 15.20.540, these are:

> (1) Malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election;
>
> (2) When the person certified as elected or nominated is not qualified as required by law;
>
> (3) Any corrupt practice as defined by law sufficient to change the results of the election.

Mr. Pruitt has never claimed that Dr. Snyder is not qualified, so he had to allege and prove claims meeting the requirements of either subsection (1) or (3).

"[P]laintiffs in Title 15 election contests," like Mr. Pruitt, "carry a heavy burden."[7] Courts presume that election results are valid,[8] and "[t]here is a 'well-established policy' favoring the stability of election results in the face of technical errors or irregularities not affecting election results."[9] Because of this presumption and the

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6 AS 15.20.540, .550.

7 *Grimm v. Wagoner*, 77 P.3d 423, 432 (Alaska 2003).

8 *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995), (*citing Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968)); *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963) (holding "every reasonable presumption will be indulged in favor of the validity of an election").

9 *Grimm*, 77 P.3d at 432 (*quoting Carr v. Thomas*, 586 P.2d 622, 625–26 (Alaska 1978)).

requirement that an issue be "sufficient to change the result,"[10] Mr. Pruitt bears a "dual burden."[11] He must allege qualifying conduct under subsection (1) or subsection (3), *and* allege that it was sufficient to change the result. To survive dismissal, Mr. Pruitt had to "allege and prove the necessary elements of an election contest claim . . . ."[12]

"Malconduct" under subsection (1) comes in two forms. Malconduct can be "'a significant deviation from statutorily or constitutionally prescribed norms' which introduces a bias into the vote."[13] An election official's actions introduce bias when they influence voters to "vote a certain way."[14] Actions do not introduce bias merely because they happen to occur in a precinct that favored one candidate over another.[15]

If an election official's actions did not introduce bias, a plaintiff must establish that the "significant deviation from statutorily or constitutionally prescribed norms" resulted from the election official's "knowing noncompliance with the law or a reckless indifference to norms established by law."[16] Thus, absent bias, an election official must

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10 AS 15.20.540(1), (3).

11 *Dansereau*, 903 P.2d at 559.

12 *Miller v. Treadwell*, 245 P.3d 867, 877 (Alaska 2010).

13 *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979) (*quoting Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978)).

14 *Nageak v. Mallott*, 426 P.3d 930, 945 n.60 (Alaska 2018) ("Bias exists at the malconduct stage when conduct of election officials influences voters to vote a certain way.").

15 *Id.*

16 *Hammond*, 588 P.2d at 259 ("Significant deviations which impact randomly on voter behavior will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law."); *Willis*, 600 P.2d at 1081.

act knowingly or recklessly to commit malconduct,[17] and "an election official's good faith may preclude a finding of malconduct under certain circumstances."[18]

As an alternative to election official "malconduct" under subsection (1), an election contest plaintiff could allege and prove a "corrupt practice as defined by law" under subsection (3). But Alaska law defines only certain crimes as "corrupt practices": specifically, campaign misconduct in the first and second degrees,[19] telephone campaign misconduct,[20] and unlawful interference with voting in the first and second degrees.[21] Each of these statutes specifies that "[v]iolation of this section is a corrupt practice."[22]

An election contest plaintiff must also allege and prove that the malconduct or corrupt practice was "sufficient to change the result." Although a plaintiff need not allege that it *actually* changed the results,[23] a plaintiff must at least allege that it had the

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17 *But see Nageak*, 426 P.3d at 945 n.60 ("We have never held that a deviation was significant enough from the norm to constitute malconduct absent scienter or bias, but we also have not foreclosed the possibility of demonstrating malconduct by showing good faith maladministration.").

18 *Hammond*, 588 P.2d at 259.

19 AS 15.56.012, .014.

20 AS 15.56.025.

21 AS 15.56.030; .035.

22 *See e.g.*, AS 15.56.030(b).

23 *Boucher v. Bomhoff*, 495 P.2d 77, 80 n.5 (Alaska 1972).

possibility of changing the results.[24] "Any malconduct on the part of election officials must be of sufficient magnitude 'to change the results of the election.'"[25]

II. The superior court correctly rejected count two of the election contest.

In count two of his complaint, Mr. Pruitt alleged that the Division violated AS 15.10.090 by failing to provide the required notice of a change in the polling place location for Precinct 915. [R. 546-47] The superior court correctly dismissed this claim because it failed to adequately allege facts meeting the legal definition of "malconduct." [R. 504-07] And in the alternative, the superior court correctly found that this claim failed on the merits because Mr. Pruitt failed to meet his burden of proof at trial.

A. The superior court properly dismissed count two for failure to state an election contest claim.

An election contest complaint cannot survive on bare legal conclusions and conclusory allegations that do not actually describe facts that would meet the election contest standard. Even accepting Mr. Pruitt's factual allegations from the complaint as true, while setting aside his "unwarranted factual inferences and conclusions of law,"[26] his second count fails to state a viable election contest claim. Mr. Pruitt did not allege—either directly or factually—that the Division *significantly* deviated from the notice requirements in AS 15.10.090, or that any such deviation was knowing or reckless.

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24 *Nageak*, 426 P.3d at 947 n.73.

25 *Hammond*, 588 P.2d at 259 (*quoting* AS 15.20.540); *see Nageak*, 426 P.3d at 950 (finding malconduct insufficient to change the result because it did not result in a "net gain" of votes greater than the margin between the candidates).

26 *See Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020).

Indeed, the Division did not truly deviate from AS 15.10.090 at all, because that statute is not geared toward last-minute polling place changes like this one. It provides:

> The director shall give full public notice if a precinct is established or abolished, if the boundaries of a precinct are designated, abolished, or modified, or if the location of a polling place is changed. Public notice must include
>
> (1) whenever possible, sending written notice of the change to each affected registered voter in the precinct;
>
> (2) providing notice of the change
>
> (A) by publication once in a local newspaper of general circulation in the precinct; or
>
> (B) if there is not a local newspaper of general circulation in the precinct, by posting written notice in three conspicuous places as close to the precinct as possible; at least one posting location must be in the precinct;
>
> (3) posting notice of the change on the Internet website of the division of elections;
>
> (4) providing notification of the change to the appropriate municipal clerks, community councils, tribal groups, Native villages, and village regional corporations established under 43 U.S.C. 1606 (Alaska Native Claims Settlement Act); and
>
> (5) inclusion in the official election pamphlet.

The context, history, and text of this statute show that it is geared toward permanent changes, not temporary, last-minute changes. It is located in Title 15's chapter on "Election Precincts, Election Officials, and Redistricting," and follows a statute covering "precinct boundar[ies]," which are not changed on an emergency basis.[27] It

[27] AS 15.10; AS 15.10.080.

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originally applied only to precinct boundary changes; when polling place changes were tacked on later, the then-Director of the Division said "the intent is not to do a notice every time the division has a polling place modification, but instead to [give] notice [to] people of a polling place location."[28] And although the statute's text contemplates that "sending written notice" to voters may not always be possible—because subsection (1) begins with the qualifier "whenever possible"—the text does not contemplate that it might *not* be possible to publish notice of a change in the official election pamphlet, even though that pamphlet must be mailed out twenty-two days before the election.[29] This suggests that the statute was not intended to apply to last-minute changes.

The superior court nonetheless concluded, despite this context and history, that AS 15.10.090 applies to temporary and emergency polling place changes like the one that occurred here. [R. 530-31] But even under the superior court's interpretation, count two fails to state an election contest claim. The superior court decided that the statute applies to "all polling place changes . . . if compliance is possible under the circumstances." [R. 530] Thus, "the Division is required to notify voters of polling places as provided in the statute when it is reasonably able to do so, regardless of whether the change is permanent or temporary." [R. 531] The court reasoned that this interpretation is consistent with the view that statutory requirements are "directory"—

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28 Minutes of Alaska House State Affairs Committee, March 15, 2005 at 18, available at http://www.akleg.gov/basis/Meeting/Detail?Meeting=HSTA%202005-03-15%2008:00:00.

29 AS 15.58.080(a).

meaning desirable rather than mandatory—in the context of election contests, such that imperfect compliance will not void an election.[30] [R. 529, 533]

Under either the State's interpretation or the superior court's, the result is the same: Mr. Pruitt's complaint failed to allege a significant deviation from AS 15.10.090. An allegation that the Division only slightly deviated from statutory requirements is not grounds for an election contest. As this Court explained in *Dansereau v. Ulmer*, "a technical failure to comply strictly with [a] statute is not sufficient to invalidate ballots where the purpose of the statute has been satisfied."[31] It would be contrary to public policy to void an election due to a necessary and reasonable last-minute polling-place change on the grounds that the Division was unable to provide notice according to AS 15.10.090, strictly construed. The Division must be able to change a polling place close to an election when necessary without risking voiding the election—otherwise, voters in the precinct would not have a place to vote on Election Day.

In addition to Mr. Pruitt's failure to allege a "significant" violation, his failure to allege a knowing or reckless violation is also fatal to count two. He had to allege a knowing or reckless violation because the alleged notice issue did not introduce bias into the vote.[32] He contended below that it did because Republican voters outnumbered Democratic voters in Precinct 915. [R. 299-300] But this is directly contrary to *Nageak*

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30 *See Boucher v. Bomhoff*, 495 P.2d 77, 80 (Alaska 1972).

31 903 P.2d 555, 567–68 (Alaska 1995) (having applied the "requirement of a significant deviation from statutory norms to all grounds for an election contest").

32 *See supra at* 11-12.

v. Mallot, where the Court explained that "election officials' actions do not constitute bias just because they occurred in a precinct that lopsidedly favored [one candidate]."[33] Mr. Pruitt has since conceded that the Division's notice did not introduce bias. [R. 636, "[The Division's] malconduct had a random impact on voter behavior."]

Mr. Pruitt thus had to allege that the Division knowingly or recklessly violated the statute, but as the superior court correctly concluded, he did not. [R. 505] Based on the face of Mr. Pruitt's complaint—without considering the unpled assertions he raised for the first time in his opposition to the motions to dismiss—Mr. Pruitt failed to "allege that the violation was knowing or reckless, or allege facts that would support a finding of knowing or reckless conduct." [R. 505] The superior court explained that pleading requirements in election contests are "not a mere technicality," so "the failure to allege an essential element of an election contest, or to allege facts that could support the finding of an essential element, must result in dismissal." [R. 507]

The Court should therefore uphold the superior court's dismissal of count two for failure to state an election contest claim.

B. Even if count two had been properly pled, the superior court did not clearly err in finding that Mr. Pruitt failed to meet his burden at trial.

If the Court decides that count two was adequately pled, the Court should review the superior court's alternative factual findings about count two for clear error, reversing only if "left with a definite and firm conviction based on the entire record that

[33] *Nageak*, 426 P.3d at 945 n.60 (quotation marks omitted).

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a mistake has been made."[34] Not only should the Court defer to the trial court's findings, but it should also defer to the election result because "every reasonable presumption will be indulged in favor of the validity of an election."[35]

The superior court did not clearly err in rejecting count two on the merits. Not only was count two inadequately pled, but the trial revealed that it was also inadequately supported because Mr. Pruitt's evidence failed to meet either part of his heavy election contest burden. Instead, his evidence of "malconduct" showed only that the Division—faced with administering an election during a pandemic—had to move the Precinct 915 polling place; updated its website and posted signs at both prior polling places; and provided voters with a place to vote on Election Day. And his evidence that this was "sufficient to change the results of the election" was based on an unsupported assumption coupled with a simple arithmetic calculation that "would not be considered a valid argument in any professional setting." [Tr. 153]

i. The Division's handling of the Precinct 915 polling place change was reasonable and not "malconduct."

Mr. Pruitt first had to establish election official "malconduct" by showing a "significant deviation from statutorily or constitutionally prescribed norms" that resulted from a "knowing noncompliance with the law or a reckless indifference to

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[34] *See Casey v. Semco Energy, Inc*., 92 P.3d 379, 382 (Alaska 2004) ("We review a trial court's factual findings for clear error, which is found when we are left with a definite and firm conviction based on the entire record that a mistake has been made.").

[35] *Nageak*, 426 P.3d at 950 (Alaska 2018) (quoting *Dansereau*, 903 P.2d at 559).

norms established by law."[36] After hearing the evidence at trial, the superior court did not clearly err in finding that Mr. Pruitt failed to meet this burden. [R. 504-07]

As the superior court correctly found, "[t]here were significant challenges to running the elections during fall 2020, primarily because of the Covid pandemic." [R. 521] There were eighteen unplanned polling place changes in Anchorage in 2020, compared to about five in an ordinary year. [Tr. 52] Regional supervisor Julie Husmann believed in having a "plan B," especially after hearing that some other states went from more than a hundred polling places to just a few because of the pandemic. [Tr. 52-53]

In the August 18 primary election, the Division had to move the polling place for Precinct 915 from Wayland Baptist University the day before the election when it learned that the facility would not let anyone enter without answering COVID-19 screening questions. [Tr. 25-26, 160] The Division immediately moved the polling place to nearby Muldoon Town Center, which was already hosting another polling place. [Tr. 26-27] The Division posted signs about the change at Wayland Baptist University, and primary election voting for Precinct 915 occurred at Muldoon Town Center. [*Id.*] In between the primary and the general election, the Division assumed that the polling place for Precinct 915 would again be Muldoon Town Center. [Tr. 37]

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[36] *Hammond*, 588 P.2d at 259 ("Significant deviations which impact randomly on voter behavior will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law."); *Willis*, 600 P.2d at 1081.

But on October 22, when Ms. Husmann called the owner of Muldoon Town Center to confirm that there would again be two precincts there at the general election, he refused to host two. [Tr. 39-40] As soon as Ms. Husmann learned of the need to move the polling place, she invoked the Division's backup plan for Precinct 915, asking the Anchorage School District for permission to use Begich Middle School. [*Id.*] On October 27, once the school principal had approved, the Division and the school district confirmed that Begich Middle School would be the polling place. [R. 870, 965-72] That left the Division only six days to notify voters of the change, which the Division did by updating its website and its voter information hotline, and by posting signs at both Wayland Baptist University and Muldoon Town Center. [R. 713-14; Tr. 28-29, 162-64]

The superior court did not clearly err in finding that any failure by the Division to provide full statutory notice of this change under AS 15.10.090 was not "significant." [R. 533] The steps the Division took "did provide notice to the registered voters of the change in polling location." [R. 528] The court correctly recognized that "for a change this close to the election, most of the forms of notice under AS 15.10.090 could not reasonably be accomplished and were therefore not mandated by the statute," and that "[t]he Division partially complied with the statute by posting notice on its website" and taking "other steps to provide notice." [R. 532] The court found that the Division could have complied with AS 15.10.090(4)'s requirement that it notify the Municipal Clerk. [R. 522] But the court found that "[t]he Division's lack of strict compliance" with this

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requirement was not "significant" because the purpose of the statute—adequate public notice—was satisfied by the other steps the Division took. [R. 533]

And even if the Division had "significantly" deviated from the law, its actions would still not be malconduct because the superior court found that they were not "imbued with scienter."[37] The court found that the Division's employees "acted in good faith in attempting to notify affected voters about the change to the polling location" even though there was "more the Division could have done." [R. 528] The court declined to find that any deviation was "knowing or done in reckless disregard of the statute's requirements." [R. 534] None of these findings were clear error.

Mr. Pruitt cannot now save count two by morphing it into a claim that the Division committed malconduct by failing to provide full statutory notice back when it believed that Muldoon Town Center would serve as the polling place during the general election. Mr. Pruitt has recently developed a theory based on the notice of this intermediate change—from Wayland Baptist University to Muldoon Town Center—rather than the operative change to Begich Middle School. But Mr. Pruitt made no allegations about this in his complaint. [R. 547, "In 27-915, the location was changed from Muldoon Town Center to Begich Middle School without notice pursuant to State law."] And in any event, it is illogical to allege that inadequate notice of Muldoon Town Center—which was *not* the polling place for the general election—had any impact on

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[37] *Hammond*, 588 P.2d at 259 ("[A]n election official's good faith may preclude a finding of malconduct under certain circumstances.").

the result of the general election. The superior court recognized this when it refused to "consider whether the Division would have significantly deviated from AS 19.10.090 [sic] had the election been held at Muldoon Town Center because this is not where the polling for 27-915 took place." [R. 533] Increased public notice about Muldoon Town Center would not have assisted voters in voting at Begich Middle School.

The superior court thus did not clearly err in finding that Mr. Pruitt failed to meet his election contest burden of showing "malconduct."

ii. Mr. Pruitt failed to prove that any notice issue was "sufficient to change the result of the election."

Even if Mr. Pruitt had proven that the Division committed "malconduct," he would still bear the burden of proving that it was "sufficient to change the result of the election."[38] His argument on this point relied almost entirely on the flawed expert testimony of Randy Ruedrich. The superior court did not clearly err in rejecting this flawed analysis and concluding that Mr. Pruitt failed to meet his burden. [R. 534]

This Court has closely scrutinized expert evidence offered in support of the theory that a problem was sufficient to change an election result, rejecting the testimony of the same expert used here: In *Nageak v. Mallot*, the Court observed that Mr. Ruedrich engaged in "simple averaging" and "fail[ed] to take into account the significant differences on the ballots in different years' elections," thus ignoring "legally significant factors" in analyzing the effect of a problem on an election.[39] So too here: as the State's

38 AS 15.20.540(1).

39 *Nageak*, 426 P.3d at 948-51.

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statistical analysis expert, Ralph Townsend, explained, Mr. Ruedrich's analysis "would not be considered a valid argument in any professional setting." [Tr. 153]

Mr. Ruedrich opined that there was an "undervote" in Precinct 915, and that fifty-seven fewer people voted in person at Precinct 915 on Election Day than would have voted had the polling place not changed. [Tr. 85] But his opinion was based on a central assumption that the in-person turnout in Precinct 915 should have been *exactly the same* as the turnout in two neighboring precincts, 910 and 920. [Tr. 88] He offered no explanation or evidence to support this assumption. [Tr. 92-93] And as the superior court correctly found, "[t]his assumption is flawed." [R. 524] Statistics from the 2016 and 2018 elections show that the turnout in these three precincts—or any precincts—is never exactly the same. [R. 725-27] The superior court thus correctly found that "it cannot be said that averaging the differences" between these precincts "results in a reliable calculation of any Election Day undervote" in Precinct 915. [R. 525]

The superior court also properly credited the testimony of the State's expert, Dr. Townsend, who explained that Mr. Ruedrich did not take the necessary first step of ruling out the possibility that the difference in in-person turnout between Precincts 910, 915, and 920 was due to chance. [R. 525; Tr. 150] Mr. Pruitt complains that Dr. Townsend is not an expert in politics, but he is an expert in statistical analysis, and fully qualified to point out such methodological errors. [Tr. 143-45] Dr. Townsend explained that there are rudimentary, well-established statistical techniques that could be used to determine whether the differences in turnout at the three precincts was

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unlikely to be due to chance. [Tr. 150-51] He testified that without completing this first step, Mr. Ruedrich could not proceed to the next step, which would have been to determine the cause behind a meaningful difference in turnout in Precinct 915. [Tr. 152] Dr. Townsend concluded that Mr. Ruedrich did not demonstrate that there was any "undervote" in Precinct 915, much less what caused the undervote. [Tr. 153]

Even if Mr. Ruedrich's analysis had shown a meaningful difference in turnout in Precinct 915—which it did not—Mr. Ruedrich himself acknowledged that he did not consider possible explanations for the "undervote" or to try to differentiate between factors that could have influenced turnout. [Tr. 108-09] He opined that changing a polling place, in and of itself, generally depresses turnout. [Tr. 105-06] But he failed to understand, much less analyze, the crucial difference between an undervote caused by the polling place change itself and an undervote caused by the Division's purportedly inadequate notice of it. He stated he "had no recollection of ever having thought about [that distinction] before," and called it a "distinction without a difference." [Tr. 108-09] He offered no opinion or analysis about the adequacy of the Division's notice. [*Id.*] And as the superior court recognized, neither Mr. Ruedrich's testimony nor any other evidence explained how the Division's failure to perfectly comply with the feasible parts of AS 15.10.090—such as by notifying the Municipal Clerk—could have "caused a reduction in votes sufficient to change the result." [R. 526-27]

As in *Nageak*, it was Mr. Pruitt's "burden to show that the malconduct [alleged] was sufficient to change the result of the election, and 'every reasonable presumption

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will be indulged in favor of the validity of an election.'"[40] And as in *Nageak*, Mr. Pruitt relied on a flawed expert analysis that does not actually support his claim.[41] As the superior court aptly observed of Mr. Ruedrich's analysis, his "two primary assumptions . . . are also his conclusions." [R. 526]

The only other evidence offered on this point was the testimony of a single voter, who initially went to the wrong location to vote, saw the sign directing voters to Begich Middle School, went to Begich Middle School, and decided not to vote after seeing a long line. [Tr. 114-15] But as the superior court correctly found, this voter "did not testify that she was unable to locate her polling place or that she was prevented from voting." [R. 527] On the contrary, she received notice of the polling place change when she saw the Division's sign, and there is no reason she could not have voted then, later in the day, or by other means prior to Election Day. [Tr. 114-15] In fact, her testimony showed that many voters received notice of the polling place change, because as many as forty-five people had found their way to Begich Middle School and were standing in line around 9:00 a.m. despite the recent change to the location. [Tr. 119-20]

The *Division's conduct* did not prevent this voter from voting, and Mr. Pruitt presented no evidence that any voters were actually unable to vote because they could not find the correct polling place. The superior court did not clearly err in declining to "find that at least 11 registered voters were prevented from voting because they did not

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40 *Id*. (quoting *Dansereau*, 903 P.2d at 559).

41 *Id*.

receive actual notice of the polling place change." [R. 528] As for voters who "received actual notice" but did not want to go to Begich Middle School or did not want to wait in line, the court correctly concluded that it "cannot count those 'undervotes'" in assessing whether any notice inadequacy was sufficient to change the result. [R. 527] The pandemic has made many aspects of daily life less convenient. Despite the pandemic, the Division gave voters in Precinct 915 many different voting opportunities spanning several weeks, and posted notice of the polling place change. If some voters became frustrated by the inconvenience and went home rather than taking the time to go to the correct polling place, that was their choice. The Division did not disenfranchise them.

The superior court thus did not clearly err in finding that Mr. Pruitt failed to meet his burden of showing that the alleged malconduct—failure to provide all of the forms of notice in AS 15.10.090—was "sufficient to change the result." [R. 534] Accordingly, if the Court decides that count two was adequately pled, the Court should affirm the superior court's rejection of it on the merits.

III. To prevent future voter harassment, the Court should clarify that post-election voter residency challenges cannot void an election.

In both the election contest and the recount appeal, Mr. Pruitt and his supporters sought to void the election result on the theory that an ever-shifting list of people who voted in the House District 27 election do not truly reside in the district. Mr. Pruitt had staff investigate voters, calling their homes to ask personal questions and searching and copying their property records. [R. 441-42, 263-65, 201-62] He accused a long list of voters—by name in public court filings—of wrongdoing. [R. 196, 314-15] Although

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Mr. Pruitt has since abandoned these claims, these voters' names—and Mr. Pruitt's accusations of them—remain in the public court file. The Court should discourage this kind of voter harassment and speculative accusations in future close elections by making clear that such residency claims cannot void an election.

A. Nonresident voting does not state an election contest claim.

An election contest claim that is not based on election official conduct—like a claim of nonresident voting—must allege a "corrupt practice as defined by law."[42] But nonresident voting is not a "corrupt practice." Alaska law defines only certain crimes as "corrupt practices": specifically, campaign misconduct in the first and second degrees,[43] telephone campaign misconduct,[44] and unlawful interference with voting in the first and second degrees.[45] Each of these statutes specifies that "[v]iolation of this section is a corrupt practice."[46] But nonresident voting does not violate these statutes—instead, it *might* constitute voter misconduct in the first[47] or second degree,[48] neither of which is

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42 AS 15.20.540(3).

43 AS 15.56.012, .014.

44 AS 15.56.025.

45 AS 15.56.030; .035.

46 *See e.g.*, AS 15.56.030(b).

47 Under AS 15.56.040(3), a person commits voter misconduct in the first degree if the person "intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title." Absentee ballot certificates contain such an oath.

48 AS 15.56.050(2) provides that a person commits voter misconduct in the second degree if the person "knowingly makes a material false statement while applying for voter registration or reregistration."

defined as a "corrupt practice."[49] If someone knowingly solicited nonresidents to vote, that could be a corrupt practice,[50] but not simple nonresident voting.

Although only residents of a district should vote in that district, that does not mean that any close election can be overturned if a campaign can later unearth evidence that some voters recently moved. "As a practical matter, certain persons who move to a new district, but do not reregister or notify the election officials in writing of a change in residency, may have their votes counted in the district of their prior residency simply because election officials do not know that their residency has changed."[51]

As the superior court recognized, "[a]n election contest does not provide an end-run around" the "procedure established by law, which allows a voter's qualifications to be challenged at the polls," and provides for a "voter to cast a questioned ballot upon such a challenge, and for the Division to resolve the question and determine whether to count the questioned ballot, which is segregated so if the determination is overturned the ballot may simply be removed from the count" in a recount appeal. [R. 508] If poll watchers have reason to question a voter's residency, they can challenge that voter at the polls.[52] A candidate's observers at the absentee or questioned ballot review can

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49 *Cf. Dansereau*, 903 P.2d at 566 (concluding that a federal election violation was not a "corrupt practice" because it was not defined as such under Alaska law).

50 AS 16.56.035(a)(3).

51 *Cissna*, 931 P.2d at 369.

52 *See* AS 15.15.210.

make a similar challenge.[53] But if a candidate fails "to follow the statutory procedures established to question a voter's qualification, he waived the right to have that ballot rejected on those grounds and cannot avoid the effect of that waiver by bringing an election contest on those grounds." [R. 509] Thus, as the superior court correctly concluded, nonresident voting does not state an election contest claim.

B. Post-election voter residency challenges in a recount appeal likewise cannot void an election result.

Although challenges to individual voter qualifications are justiciable in a recount appeal, they must be raised at a time when they can be resolved and preserved without voiding an election. Timely challenges at the polls or during the absentee and questioned ballot review process can result in voters' ballots being segregated for further review rather than being irreversibly comingled with other ballots. During a recount, the Director can make a final decision about which such ballots to count, which the Court can then review in a recount appeal. *Dodge v. Meyer*—which was a pure recount appeal—was an example of this: observers at the absentee ballot review challenged ballots based on residency concerns, those ballots were kept segregated (along with their identifying envelopes) for further review, the Director made decisions on them at the recount, and the Court reviewed those decisions in a recount appeal.[54]

Here, by contrast, because no candidate, poll watcher, or observer ever challenged any of these voters' qualifications at any point when their ballots could be

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53 *See* AS 15.20.203(c); AS 15.20.207(c).

54 *See Dodge v. Meyer*, 444 P.3d 159 (Alaska 2019).

segregated for further review, their ballots were irreversibly comingled with other ballots. The Director thus did not—and could not—consider these voters' qualifications during the recount, and the Court could not effectively "reverse," via a recount appeal, any decision by the Director to count their ballots. The Division could not effectively conduct an election if it had to investigate every single individual voter's claim of residency in a particular district before counting that voter's ballot. That is why the Division is entitled to rely on a presumption of residency based on the information that a voter attests to when filling out a voter registration form.[55]

If a candidate has taken no steps to flag a perceived residency problem until after the election is certified—meaning that the ballots have already been comingled and counted—a recount appeal based on voter qualifications is not justiciable. Votes cannot be subtracted from the candidate totals through a recount appeal, so the only remedy for a perceived problem would be a new election. But a candidate wishing to void an election must meet the heightened election contest standard. Just as a candidate cannot use an election contest to make an end-run around the recount process, a candidate cannot use a recount appeal to make an end-run around the heightened election contest standard by asking for a new election based on an "appeal" of the counting of ballots that have not been segregated and are not identifiable.

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[55] *See* https://www.elections.alaska.gov/doc/forms/C03-Fill-In.pdf (voter registration form); AS 15.05.020(8) (presumption of residency).

This is supported by public policy. If nonresident voting could void an election—whether through an election contest or recount appeal—any close election would be an invitation for a campaign to comb through property records in an amateur investigative effort to uncover a handful of people who have recently moved.[56] Voters would be harassed and publicly accused of wrongdoing on thin evidence, as exemplified by Mr. Pruitt's superior court conduct. Not only that, but the "cure" for the problem—a new election—would really be no cure at all. A new election would be no more likely to be "perfect," from a voter residency perspective, than the original one.[57] In the interim, more voters would have moved. And if the original election was close, the new election would likely be close too, spurring repeated challenges and making finality elusive.

This distinction between recount appeals and election contests has support in statute. The election contest statute contemplates that a court might void an election: "If the court decides that no candidate was duly elected or nominated, the judgment shall be that the contested election be set aside."[58] The recount appeal statute, by contrast, instructs the Court to review "whether or not the director has properly determined what

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56 *See* R. 188 ("During review of the election, and as the news of litigation became public, Plaintiffs learned of several voters who were not qualified to vote.").

57 *See Nageak*, 426 P.3d at 947 n.74 ("We have described ordering a new election as an 'extreme remedy.' . . . This is at least partly because a second election is usually a poor approximation of the first election: among other concerns, voter turnout is likely to differ significantly, and there is no guarantee that the second election will be any more problem-free than the first.").

58 AS 15.20.560.

ballots, parts of ballots, or marks for candidates on ballots are valid, and to which candidate or division on the question or proposition the vote should be attributed."[59]

The Court's caselaw is largely consistent with this distinction as well. The earliest recount appeals were only about counting identifiable votes,[60] leaving other claims to be considered in election contests,[61] but later cases muddied the waters. In *Fischer v. Stout*, the Court decided that certain commingled ballots should not have been counted,[62] and blurred the distinction between recount appeals and election contests by borrowing a pro-rata formula from the election contest *Hammond v. Hickel* to simulate subtracting those votes in order to assess whether the result would change.[63] But given the number of ballots in *Fischer*, the Court did not have to consider remedies.[64] In *Finkelstein v. Stout*, the Court said that a new election is necessary if

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59 AS 15.20.510.

60 *See Hickel v. Thomas*, 588 P.2d 273 (Alaska 1978) (recount appeal companion case to *Hammond v. Hickel* election contest (588 P.2d 256 (Alaska 1978)), considering ballot marking issues like "[b]oxes completely filled in over prior mark" and "[p]unch card ballots marked with a pen or pencil rather than being punched"); *Carr*, 586 P.2d 622 (considering whether questioned ballots cast via punch card could be counted).

61 *See Turkington*, 380 P.2d 593 (election contest case considering claim that nonresident property owners should not have been allowed to vote); *Hammond*, 588 P.2d 256 (election contest case considering challenges to classes of ballots, including personal representative ballots from Prudhoe Bay, absentee ballots with inadequate postmarks, and absentee ballots with one witness signature on the envelope).

62 *Fischer v. Stout*, 741 P.2d 217, 226 (Alaska 1987).

63 *Id.*

64 *Id.* at 226 n.15 ("Because the errors set forth herein did not [a]ffect the result of the election, we need not, at this time, determine the procedure to be employed if the election result is put in doubt by application of the proportionate reduction rule.").

commingled ballots should not have been counted and pro-rata subtraction would change the result.[65] *Finkelstein* is the only recount appeal in which this actually happened—later recount appeals did not have to confront this problem.[66] But the Court in *Nageak* concluded that "the claim in *Finkelstein* should have been argued and decided in an election contest case and not a recount appeal."[67]

Thus, although a recount appeal may change the winner of an election if enough votes are added or subtracted, a new election is an "extreme remedy"[68] that requires meeting the election contest standard. Post-election investigation of voter residency thus cannot support a recount appeal either. The Court should consider making this clear so that candidates in future close elections do not engage in such voter harassment.

CONCLUSION

For these reasons, the Court should affirm the superior court's decision rejecting Mr. Pruitt's election contest claims.

DATED: January 4, 2021.

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65 *Finkelstein v. Stout*, 774 P.2d 786, 793 (Alaska 1989).

66 *See Cissna*, 931 P.2d 363 (affirming decisions of Director); *Edgmon v. State, Office of Lieutenant Governor, Div. of Elections*, 152 P.3d 1154 (Alaska 2007) (ordering Director to count specific ballots).

67 *Nageak*, 426 P.3d at 942.

68 *Nageak*, 426 P.3d at 947 n.73.

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